#89-019-1

IN THE MATTER OF A BOARD OF INQUIRY PURSUANT TO THE HUMAN RIGHTS CODE, 1981, CH. 53, AS AMENDED;

AND, IN THE MATTER OF A COMPLAINT MADE BY MARGARET TOMEN, DATED AUGUST 6, 1985, ALLEGING INFRINGEMENT OF THE RIGHT TO EQUAL TREATMENT WITH RESPECT TO MEMBERSHIP IN A TRADE UNION, TRADE OR OCCUPATIONAL ASSOCIATION OR SELF-GOVERNING PROFESSION ON THE BASIS OF SEX BY THE ONTARIO TEACHERS' FEDERATION (OTF) AND THE ONTARIO PUBLIC SCHOOL TEACHERS FEDERATION (OPSTF);

AND, IN THE MATTER OFA COMPLAINT MADE BY LINDA LOGAN-SMITH, DATED MAY 19, 1988, ALLEGING INFRINGEMENT OF THE RIGHT TO EQUAL TREATMENT WITH RESPECT TO MEMBERSHIP IN A TRADE UNION, TRADE OR OCCUPATIONAL ASSOCIATION, OR SELF-GOVERNING PROFESSION ON THE BASIS OF SEX BY THE ONTARIO TEACHERS' FEDERATION (OTF) AND THE ONTARIO PUBLIC SCHOOL TEACHERS FEDERATION (OPSTF)

RE: ELECTION AND MOTION TO DISMISS
THIRD INTERIM AWARD

Board of Inquiry: Dr. D.J. Baum

Appearances:

Ontario Human Rights Commission
Janet Minor, Counsel
Sharon Ffolkes-Abrahams, Counsel

Complainants
Margaret Tomen
Linda Logan-Smith
R.G. Juriansz, Counsel

Ontario Public School Teachers' Federation
R. G. Juriansz, Counsel
M. Blight, Counsel

Ontario Teachers' Federation
Thomas Forbes, Counsel

Intervenors

Federation of Women Teachers' Association of Ontario
Elizabeth Lennon, Counsel
Mary Eberts, Counsel

Ontario English Catholic Teachers' Association
Paul Cavaluzzo, Counsel
J.K.A. Hayes, Counsel

Ontario Secondary School Teachers' Federation
Maurice A. Green, Counsel
S.S. Liang, Counsel

Association des Enseignantes des Enseignants Franco Ontariens
Sean A. McGee, Counsel

Hearings on Motions: June 29 and 30, 1989 at Toronto, Ontario.

I
The Nature of the Motions Raised

On June 28, 1989, the Ontario Human Rights Commission (the Commission) completed the presentation of its case concerning the two complainants. There was an indication that the Ontario Teachers' Federation (OTF) and several of the Intervenors might move to dismiss the complaints. The Commission, the Ontario Public School Teachers' Federation (OPSTF) and the Ontario Secondary School Teachers' Federation (OSSTF) responded that if this were done, they would ask for an election. The motion, once brought, would deny the movers from introducing any further evidence.

The OTF and others intent on bringing the motion to dismiss argued that such an election was not required. I determined first to hear arguments on the question as to whether an election would be required if a motion to dismiss were made. In the result, following extensive arguments, for reasons that are stated in part II of this Interim Award, I issued an oral ruling at the June 29, 1989 hearing that an election would not be required. In doing this, I also indicated the nature of the motions. That ruling can be found at Transcript pages 801-802.

I ruled that the motions before me would be treated as encompassing a claim (a) that there is no evidence to support the essential allegations in the complaints; or (b) that there is insufficient evidence to establish such allegations. In this regard, I determined that the motions were not the kind which I would treat either as motions to dismiss or as motions for non-suit in a strictly legal sense.

In my ruling I noted that the proceedings before me are under the *Human Rights Code*. The motions, as I saw them, went to whether there was either no evidence or insufficient evidence, accepting that which was presented by the Commission and the complainants, to establish a *prima facie* case. The establishment of a *prima face* case was all that was deemed necessary for the onus, or burden to shift. In this regard, I determined that the motions, in effect, must have gone to the jurisdictional facts necessary to make out that *prima facie* case. My response to the motions accordingly had to be quite limited; I had to rule whether there was no evidence or insufficient evidence to establish that *prima facie* case. It was in such a setting that I ruled no election would be required of those putting forward the motions.

This third interim award, in addition to this introductory section, will proceed to develop the arguments and my reasons for not requiring an election in part II. Part III relates to the merits of the motions to dismiss.

II
The Question of Election

As such, there is no precedent to direct me on the question of election. On this point, all counsel, I believe, are agreed. The reason for this is rooted in the *need and the right of a Board of Inquiry* to control its own proceedings. This is made clear by §§ 35(2) *et seq.* of the *Human Rights Code, 1981* which give to a Board of Inquiry the broad-ranging responsibility to do that necessary to hear and determine the issues raised in a complaint. In *Re Toronto Police Commissioners and Ontario Human Rights Commission* (1979), 27 O.R.(2d) 48, 53, Labrosse, J., speaking for the Divisional Court, stated: "The Board [of Inquiry] has exclusive jurisdiction over the conduct of its procedure and the exercise of its discretion to grant [the requested] adjournment is not reviewable by this Court, provided the Board has not violated recognized principles of fairness." (Cited in *Nimeka v. CN Hotels*, 6 C.H.R.R. D/2894 (Interim Decision 1985) at ¶23561.)

Indeed, there are, putting aside the *Charter of Rights and Freedoms*, three basic constraints operating on a Board of Inquiry in setting the procedure it deems appropriate for the conduct of the hearing:

- Nothing can be done which relieves the Commission from the burden of carrying the complaint. Such is the clear language of § 38(2)(a) of the *Human Rights Code*.

- The requirements of the *Statutory Powers Procedure Act, R.S.O., Ch. 484*, must be met. In principle, this means, *inter alia*, that those who are directly affected by the proceedings must know the charges made against them, and that they must be given a full and fair opportunity to respond to such charges. (See, §§ 6, 10(c).) In the result, however, the tribunal has significant control over the evidence that it can receive and upon which it can rely. (See §§ 15, 16.)

- The rules of Natural Justice, within the context of the *Human Rights Code* and the *Statutory Powers Procedure Act*, apply. It is enough to say that these rules impose standards of

fairness in the conduct of hearings. They complement rather than derogate from the standards of the *Statutory Powers Procedure Act*. (See, Baum, *Cases and Materials on Administrative Law*, Butterworths, 1987, at chapter 4.)

Professor Hubbard in his interim decision in *Nimeka v. CN Hotels*, *supra*, cited another case referred to him by both the Human Rights Commission and the Respondent, *Re Cedarville Tree Services Ltd. and Labourers' International Union of North America, Local 183*, 22 D.L.R.(3d) 40. *Cedarville* related to a determination of the Ontario Labour Relations Board concerning its own procedures. What the Ontario Court of Appeal held, Professor Hubbard said, was applicable to Boards of Inquiry under the *Human Rights Code*. I agree. The Court of Appeal stated:

> It is clear that under the *Labour Relations Act* the Board is master of its own house not only as to all questions of fact and law falling within the ambit of the jurisdiction conferred upon it by the Act, but with respect to all questions of procedure to be followed by the Board when acting within that jurisdiction. In my view, the only rule which should be stated by the Court (if it be a rule at all) is that the Board should, when its jurisdiction is questioned, adopt such procedure as appears to it to be *just and convenient in the particular circumstances of the case before it*. [Emphasis added.]
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> . . .
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> In conclusion, therefore, it is my view that it has been a mistake in the past, and it would be a mistake now, to endeavour to lay down a course of procedure to be followed by the Board when its procedure is questioned and it appears that the matter is one which may perhaps be tested in the Supreme Court. The Board has been entrusted with very wide powers in the labour relations field, and so long as it operates within the ambit of its jurisidiction, it is for the Board itself to decide how it shall proceed. If procedural guidelines of a mandatory nature are to be laid down, they should come from the Legislature and not from the Court.

Having said that, the Board of Inquiry must establish its own procedures for the conduct of a hearing, Professor Hubbard determined that the respondent *should be put to an election*. It is important, in my

view, to emphasize why this was done. Professor Hubbard recognized that Ontario practice in civil matters required that parties moving for what this province continues to call a non-suit should be put to their election. (See, ¶23567, *supra*) In this regard, Professor Hubbard gave *his reasons* as to why this is a just and convenient procedure in most instances. He said that to do otherwise would be to grant the defendant or respondent an unfair advantage:

> Unlike the criminal process, which pits the state against an individual who risks criminal sanction, and who must be found guilty beyond a reasonable doubt, a civil action involves the resolution of conflicting interests on a balance of probabilities. In that context, it seems only fair that the defendant must make up his or her mind whether to close the case after the plaintiff's evidence is in, thus thwarting the plaintiff's access to evidence that might have made the latter's case, or to proceed to call witnesses at the risk of assisting the plaintiff's case. Otherwise, the defendant would appear to be saying to the tribunal: "I want you to decide this case without hearing all the evidence, some of which might be helpful to the plaintiff, but only if you decide in my favour, the effect of which is to dismiss the action; if you are unprepared to decide in my favour on the basis of the evidence adduced by the plaintiff, then I want you to postpone deciding the case until my evidence is in as well, even though some of it may prove of assistance to the plaintiff." If such a "heads I win, tails I don't lose" suggestion appears unseemly in relation to an action before a civil court, it would seem even less acceptable in a hearing before a Board of Inquiry such as this. In leaving such a Board largely unfettered by rules of evidence, and in permitting it to determine its own procedures, the Legislature appears to have intended it to have very wide powers to gather all the information it feels necessary to come to a proper conclusion regarding the complaint before it. For this reason, I would be most reticent to adopt a procedure that would require me to reach a decision without hearing all the evidence available, which decision would be a final disposition of the case if it were favourable to the respondent, but would have no other effect than to interrupt the proceedings if it were favourable to the Commission and the complainant. [*Id.* at ¶23568.]

The argument was made before Professor Hubbard that the requirement of an election would effectively foreclose the motion for non-suit. This, in turn, might result in the respondent being put to "great expense which could otherwise be avoided." Professor Hubbard rejected the argument. He stated at ¶ 23570: "There is always some expense which could otherwise be avoided. There is always some expense involved in mounting a defence, whether in actions before the civil courts or in hearings before a Board such as this. And if that were the criterion for deciding whether fairness dictates that a respondent should be spared having to make an election, the invariable rule referred to would again emerge, carrying with it the implication that the practice in the civil courts is unfair."

Yet, having said this, Professor Hubbard went on to indicate that there might be "exceptional" circumstances which would warrant dispensing with an election. "However," he said, "there is nothing in the circumstances of the present case to persuade me to dispense with such an election."

Put to that choice, the respondent declined to press its motion for non-suit. The defence to the charge of racial harassment and discrimination was presented. At issue was whether the complainant was disciplined in his employment in part because of his race. Professor Hubbard found that there was no merit to the complaint. Indeed, he went so far as to undertake a discussion on his own initiative as to whether that lack of merit justified awarding costs to the respondent. [See, *Nimako v. Canadian National Hotels*, 8 C.H.R.R. D/3985, June 1987.]

I have discussed *Nimako* in some depth because I believe that the decision as to whether to afford what Mr. Forbes has properly called in this province a motion for non-suit, but which I prefer to characterize for the purpose of this statutory tribunal as a motion to dismiss, is founded in the first instance on the facts individual to the case. In *Nimako*, there were significant issues around credibility. It simply was not possible for the Board to arrive at a *final conclusion* as to the credibility of witnesses at the conclusion of the Commission's case if there were to be further evidence presented should the respondent's motion for non-suit have been denied and no election have been compelled. I note, too, that at no point in his decision did Professor Hubbard deny the individual nature of the decision that must be made in terms of compelling an election. Nor, it should be emphasized, did Professor Hubbard deny the overriding standard for passing upon the question: On the facts, what is just and convenient?

Putting the principle as I have allows in appropriate cases arising before a Board of Inquiry for the requirement of an election to be imposed. To that extent, the prevailing rule of practice in Ontario is not, as such, challenged in its application to statutory tribunals. Indeed, I recognize, as Professor Hubbard did, that the need for an election is a well-established practice in Ontario. In *Jurasits v. Nemes*, 8 D.L.R.(2d) 660 (1957), Laidlaw, J.A., for the Ontario Court of Appeal stated at 667: "I have described the course of proceedings at trial for the purpose of directing special attention to the matter of the application for nonsuit, and, in particular, the fact that the learned Judge did not require counsel for the defendant to elect whether or not he would call any evidence in defence. With great respect, I express the view that the procedure followed by the learned Judge was not in accordance with the practice as set forth and approved in many cases. I refer to *Parry v. Aluminium Corp.* (1940), 162 L.T. 236; *Laurie v. Ragland Bldg. Co.* (1941), 3 All Eng. R. 332; *McKenzie v. Bergin* (1937) O.W.N. 200. I think the well-established practice as described in those cases ought to be followed."

However, it should be noted that the established procedure concerning an election is not rigourously followed in Ontario. Nor is the principle reflected in all other provinces. For example, in *Wingold v. W.B. Sullivan Construction Limited et al.*, Supreme Court of Ontario, Hughes J. in an oral judgment spoke of the practice requiring an election in a motion for non-suit. He referred to the so-called precedential ruling in *Martin v. Canadian Pacific Railway* (1932) and stated: "I confess I have always found the rationale of the principle (and it has become a principle) difficult to detect. . . Now this decision which says nothing about putting counsel moving in this way to his election, has been referred to with approval by all courts, as I read the cases, but since 1932 in this province a sort of general exegesis has been built up of a confusing nature and fashioned more by the plight of the counsel in the trial courts than the Court of Appeal and also by some strong words which have been said by the Court of Appeal in England which seems to me, with great respect, to have been overly worried about the length of time that might be taken by counsel having two shots at the target in a motion of this kind." In the result, Hughes J. allowed a motion for non-suit without calling for an election.

A somewhat more detailed analysis was made by Hamilton J. of the Manitoba Court of Queen's Bench stated in *Jehle and Wiese v. Petoski and Petoski*, [1977] 1 W.W.R. 438, 439. He took a different approach than the Ontario courts:

> [Having reviewed other decisions] these cases establish to my satisfaction that a judge in civil non-jury cases, does have a discretion with respect to a motion to dismiss. If the case is one where some essential ingredient may be lacking, the judge may entertain a motion for dismissal at the end of plaintiff's case without requiring the defendant to close his case if his motion does not succeed. The judge, at that point, is being asked to decide, as a matter of law, not of fact, whether, even if all the evidence of the plaintiff is accepted, any case has been made out. In my opinion, the question to be considered by the judge at that point is not a question a jury would consider .... The judge, sitting alone, is being asked to consider the question on the same basis as a judge sitting with a jury would consider it, that is, to determine whether any case has been made out by the plaintiff.
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> If the purpose of a trial is to settle the real issues between the parties, the rules of practice should, in my opinion, be directed to that end. If no case has been made out at the end of the plaintiff's case, it appears reasonable to me that a party should be entitled to ask, and a judge should be able to consider whether the case is worth continuing. It appears inappropriate to require a trial to continue for days or weeks when it might properly be terminated at the end of the plaintiff's case. Defence counsel, of course, never know how a judge may consider the evidence led to date. A motion for dismissal can seldom be made with absolute certainty of success. In my opinion, it is reasonable to consider a motion for non-suit, based on a legal argument, without requiring the defendant to take the risk of giving up other defences that may be open to him.

In another decision of a statutory tribunal, *Ontario Human Rights Commission and Abary v. North York Branson Hospital*, 9 C.H.R.R. D/4975 (1988), the Board of Inquiry chaired by Mr. Ratushny in an interim decision did allow a motion to dismiss to be made without requiring an election. In so doing, the Board did not mention the interim decision of Professor Hubbard where the issue of election on a motion to dismiss was extensively discussed. Mr. Ratushny stated:

> I am of the view than an application in the nature of "no case to meet" should be permitted before administrative tribunals

> without requiring the respondent first to elect whether or not to call evidence. The basic principle has been articulated by Mr. Justice Lamer in *Dubois v. The Queen*, [1985] 2 S.C.R. 350.
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> Essentially, it is that an accused should not be required to present evidence unless the Crown has first presented evidence upon which a conviction *could* be based. Similarly, in administrative hearings, particularly where the propriety of conduct is involved, a respondent should not be required to present evidence unless the proponent has first presented evidence upon which an adverse finding *could* be based. In other words, the principles of fairness should not require an evidentiary response in the absence of a "case to meet."

There are judicial decisions which support the analogue that Mr. Ratushny drew to the criminal law. See, *Jehle and Wiese v. Peloski and Peloski*, *supra*, at 440. However, it is not for that reason that I have allowed the motions to be made in this matter without requiring an election. In my view, each Board of Inquiry must fashion what is convenient and just in the context of the facts before it. I noted earlier in this section of the Award that a constraint on a Board of Inquiry in fashioning procedures for a hearing is that it must leave undisturbed the Commission's responsibility to carry the complaint by making out a *prima facie* case. I see the motions before me eseentially as asking whether the Commission has made that *prima facie* case.

Mr. Forbes, interpreting the practice in civil suits in this province, quite properly drew a line of distinction between a motion for non-suit and a motion for dismissal on the ground that there was insufficient evidence to support the Commission's *prima facie* case. These are distinctions that courts in Ontario have drawn in civil suits. In effect, Mr. Forbes (as well as several Intervenors) have argued that they have the right to ask for a non-suit on the ground that there is no evidence to support the Commission's complaints. Then, if that motion should fail, they have the right to ask for dismissal on the ground that there is insufficient evidence to support the complaints. At that point, I take it, Mr. Forbes understands that pressing a motion for dismissal on the ground of insufficient evidence would require an election because the Board of Inquiry would be required to look at the evidence before it and make a qualitative judgment.

Having the discretion to control the proceedings of a Board of Inquiry,

I am not bound to follow the practice of the courts in civil disputes in this province. The reasons for so stating are rooted, as stated before, in the statutory functions that must be performed by a Board of Inquiry, which acts both as finder of facts and determiner of law, and where the facts of a case so often are unique.

When I look at the facts relative to these complaints, they certainly must be seen as unique. The complaints, expressed through two individuals, challenge in a significant way a by-law that has been in existence for many years under which an important segment of the teaching profession of this province has been structured. The constituent parts of that structure, namely, the OTF and its member organizations, are all represented in these proceedings either as Respondents or as Intervenors, each with the status of a party. For a very considerable period of time, long before the matter came before me as a Board of Inquiry, the complainants, the constitutent organizations, and the Commission have contested under different theories ranging from the *Charter of Rights and Freedoms* to corporation law many of the underlying facts relative to these complaints. It may fairly be said that all of those with a direct interest in these complaints have a significant understanding of the central facts relative thereto as well as the issues arising from those facts.

The costs involved in the proceedings before this Board of Inquiry to date must have been substantial. Merely reaching the completion of the Commission's case has involved several days of hearing, exclusive of preliminary challenges that found their way to the court. Ms. Lennon on behalf of FWTAO, made the point, and I agree, that this case is "back-end loaded." That is, far more time is apt to be used to present a defence to the complaints than was taken by the Commission in its case in chief. The suggestion was that "weeks" might be taken for the presentation of the defence. I accept this suggestion, based on earlier discussions with counsel, as reality. Indeed, I asked counsel to set forth proposed hearing dates over a designated three-month period should the motions to dismiss be rejected.

It is true that Profesor Hubbard in his interim decision in *Nimako* rejected the argument that costs should have been weighed as a consideration in granting a motion to dismiss without an election. I note, however, that Professor Hubbard acted in the context of the facts in the matter before him. He did not have a multi-party dispute which had already been in contest for a significant period of time. It would be wrong for me

to turn aside a request that might shorten protracted proceedings, or perhaps assist the parties in sharpening their focus so that the proceedings might be brought to a more speedy conclusion and thereby limit heavy financial costs.

Further, while any proceeding involving a complaint under the *Human Rights Code* is by definition vested with a public interest, here the complaints deal in a structural way with the teaching profession. Here, too, we deal with the need for expedition. In a sense, it may even seem ludicrous to speak of expedition on the facts of this case. Years have passed since the complaints were first made. Months have passed from the time when this Board of Inquiry was first appointed. Still, there is no denying that the *Human Rights Code* intends matters before a Board of Inquiry to proceed expeditiously. Such is the thrust of § 38(1)(c) and § 40(7). The issues raised by the parties requiring three extended interim awards thus far have involved meaningful issues, which I have tried to handle carefully and with dispatch. In a purposeful way, I intend to press forward toward completion of these proceedings, though I recognize full well that many more months will pass before there is final resolution by this Board of Inquiry. In any event, where it is possible to shorten protracted proceedings within appropriate bounds, then, I think, that is a proper consideration for a Board of Inquiry.

For the reasons stated, therefore, I determined to hear the motions to dismiss without requiring the movers to make an election. Having said this, it is necessary define somewhat more precisely just what I will determine. In an oral ruling, the essence of which is repeated in part I of this Award, I stated that I would rule on whether the Commission and the Complainants had established a *prima facie* case in the context of the complaints. I see this ruling as one founded in law. It requires some interpretation of the complaints in relationship to the *Human Rights Code*, having regard to the facts.

Mr. Juriansz, however, raised a question as to whether my "neutrality," or perhaps more bluntly put, my impartiality might be affected by an examination and evaluation of the facts *before the entire record is completed*. Reference was made by Mr. Juriansz to a labour arbitration award, *Re Corporation of the City of Toronto and Canadian Union of Public Employees, Local 79* (1984), 17 L.A.C.(3d) 273 (Kates). There the arbitrator forcefully stated that an important policy reason for requiring a party to be put to an election in a non-suit was to preserve the decision-maker's impartiality:

> One significant purpose that is served by putting a party to its election on a motion for non-suit is to insulate the arbitrator's neutrality, as the trier of fact, from voicing an opinion on the evidence before the case has been completed. And, furthermore, the arbitrator in any event is duty-bound to avoid situations where he or she is placed in an invidious dilemma of favouring one party who can only stand to benefit from the expression of that opinion. [*Id.* at 282.]

An answer to the arbitrator's concern is found in criminal procedure. It is common practice, as Mr. Ratushny pointed out in *Ontario Human Rights Commission and Abory v. North York General Hospital, supra*, for the courts in criminal cases to hear a motion for non-suit without requiring an election. I indicated that I would not use this practice as a precedent in terms of what I should do in this matter. It is quite another matter, however, to refer to this practice on the issue of bias or impartiality. And, I do so here.

But, how am I to view the evidence? I accept the approach found in *Hall v. Pemberton*, 5 O.R.(2d) 436. In an oral judgment, Jessup, J.A. cited and applied the principle stated by Lord Penzance in *Parfitt v. Lawless* (1872), 41 L.J.P. & M. 68, at 71-72:

> I conceive, therefore, that in judging whether there is any case evidence for a jury the Judge must weigh the evidence given, must assign what he conceives to be the most favourable meaning which can reasonably be attributed to any ambiguous statements, and determine on the whole what tendency the evidence has to establish the issue.
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> From every fact that is proved, legitimate and reasonable inferences may of course be drawn, and all that is fairly deducible from the evidence is as much proved, for the purpose of a *prima facie* case, as if it had been proved directly. I conceive, therefore, that in discussing whether there is any case evidence to go to the jury, what the Court has to consider is this, whether, assuming the evidence to be true, and adding to the direct proof all such inferences of fact as in the exercise of a reasonable intelligence the jury would be

> warranted in drawing from it, there is sufficient [evidence] to support the issue.

I am bound to view the evidence through a narrow prism. I am not, as such, evaluating conflicting evidence. The question before me in terms of the evidence is whether, taking the testimony in a light most favourable to the Commission, I can determine that it has carried the burden of proof in establishing a *prima facie* case. Should I find that this has been done, I am not bound, and it would be inappropriate for me to do more, *at least as to the evidence*, than indicate that the *prima facie* case has been made because there is *some* evidence which will support the complaints.

(Indeed, that is precisely what the Board of Inquiry did in *Ontario Human Rights Commission and Abory v. North York Branson Hospital, supra*, at ¶38205, where it was stated: "Applying these conclusions to the evidence before the Board, the application of the respondents must be dismissed. There is some evidence which, if believed, could support a contravention of the *Code*. This is not an appropriate occasion for reviewing and assessing the evidence and I specifically refrain from doing so.")

III
The Motions to Dismiss

As a preface to discussion of this heading, it may be useful to remind the parties and the intervenors of my comments in the Second Interim Award in this matter at pages 8-22 where, among other things, I discussed problems related to burden of proof in the context of establishing a *prima facie* case. I cited, and indicated that I would rely upon what the Supreme Court of Canada said in *Ontario Human Rights Commission v. The Borough of Etobicoke*, 3 C.H.R.R. D/781 (1982). At paragraphs 6892-6893, the Court stated:

> The case at bar involves complaints of discrimination in respect of employment on account of age. It was common ground that the compulsory retirement at age 60 constituted a refusal to employ or continue to employ the complainants. While discrimination on the basis of age is in [enumerated] terms forbidden by § 4 of the Code, in accordance with ss. (6) an employer may discriminate on that basis where age is a *bona fide* occupational qualification and requirement for the position or employment involved. Where such *bona fide*

> occupational qualification and requirement is shown, the employer is entitled to retire employees regardless of their individual capacities, provided only that they have attained the stated age. It will be seen at once that under the Code non-discrimination is the rule of general application and discrimination, where permitted, is the exception.
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> Once a complaint has been established before a board of inquiry, a *prima facie* case of discrimination, in this case proof of mandatory retirement at age 60 as a condition of employment, he is entitled to relief in the absence of justification by the employer. The only justification which can avail the employer in the case at bar, is the proof, the burden of which lies on him, that such compulsory retirement is a *bona fide* occupational qualification and requirement for the employment concerned. The proof, in my view, must be made according to the ordinary civil standard of proof, that is, upon a balance of probabilities. [Emphasis added.]

Before proceeding further, there are two preliminary matters with which I must deal: (1) The OTF seemed to argue that the complaints, as they relate to the OTF, were deficient. The letter of appointment of the Board of Inquiry referred to the OTF as a trade union. This clearly was incorrect. Yet, just as clearly, this error did not represent a substantive error in the complaints.

My responsibility derives from sections 35 and 38 of the *Code*. Under § 35(1), as Mr. Juriansz pointed out, "the Commission may request the Minister to appoint a board of inquiry and refer the *subject-matter* of the complaint to the board." Sections 38(1)(a),(b) require the board of inquiry "to determine whether a right of the complainant under this Act has been infringed," and "to determine who infringed the right . . . ." The sections cited impose a duty on the Minister in appointing a board of inquiry and on the board, once appointed, to be concerned with the substance of the complaint. An accurate description of the respondent is not, as such, necessary for a complaint to be valid. A human rights complaint, on its face, is not a criminal proceeding requiring a strict reading of charges. Rather, I look to the *Statutory Powers Procedure Act*, and through it to Natural Justice to determine what is necessary for notice of hearing. There can be little doubt that the OTF knew that it was a respondent and that it knew the nature of the charges it had to meet. The error in description of OTF as a trade union does not constitute a fatal flaw in the

complaint.

(2) OTF argued that the two complainants, in effect, had no real interest in the complaints because neither were *teachers* within the meaning of the contested §2(a) of By-Law 1 of the By-Laws of the Ontario Teachers' Federation [By-Law 1] which provides: "Women teachers teaching all or a major portion of their assignment in an elementary public school or classes shall be members of FWTAO." The argument noted was made during the course of reply to the motions to dismiss. Mr. Juriansz, Ms. Minor and Mr. Green objected to what amounted as a new argument at that stage of the proceedings. However, while their objections certainly had an element of validity, I chose to hear the argument of OTF precisely for the reasons stated in (1), above. In doing this, I felt it necessary to give the Commission, the complainants, OPSTF and OSSTF the opportunity to respond.

There is no question that, at the present time, Ms. Logan-Smith occupies the full-time position as President of the amalgamate, the Elementary Teachers' Association of York Region. Ms. Tomen is principal of an elementary school. In a lay sense, neither are teachers in a classroom. That, however, is not the measure that I must take to determine whether the complainants are teachers within the meaning of the law and, therefore, within the meaning of By-Law 1. There are a number of reasons why the OTF argument must be rejected:

> a. On March 1, 1988, the OTF Executive denied the appeal of Ms. Logan-Smith to transfer her membership from FWTAO to OPSTF and, with that, the transfer of membership fees. It left intact an earlier decision dated June 23, 1987 *continuing the required membership* of Ms. Logan-Smith in FWTAO. Surely, this represents both an interpretation and an application of By-Law 1 as applied to Ms. Logan-Smith.
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> b. By the terms of her collective agreement, Ms. Logan-Smith in assuming the position of President of the amalgamate effected a temporary special transfer from her *permanent position as teacher.*
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> c. Section 1(1)(66) of the *Education Act* defines "teacher" in the following manner:"Teacher" means a person who is legally qualified to teach in an elementary or secondary school and is under contract in accordance with [section 16 of the Act] but

does not include a supervisory officer, an instructor in a teacher-training institution or a person employed to teach in a school for a period not exceeding one month."

Section 230 of the *Education Act* requires employment contracts in writing between a board and permanent and probationary teachers. Both Ms. Logan-Smith and Ms. Tomen meet the criteria for being teachers as set out in the *Education Act.*

d. *Ontario Teachers' Federation v. Metropolitan Separate School Board* (1976) 13 O.R.(2d) 499 (Court of Appeal) tends to re-enforce the conclusions stated. In that case, OTF challenged a *practice* of the Metropolitan Toronto Separate School Board which for a number of years had classified persons otherwise qualified as teachers in the elementary and secondary schools as co-ordinators. They were not given written contracts, and fees were not paid by them to OTF. Dubin, J.A., speaking for the majority, held that they were nonetheless teachers. He stated: "It is not without significance that unlike the definition of 'temporary teacher' and 'probationary teacher' . . . [in the *Education Act*] which requires that such teachers be 'employed to teach,' no such requirement is within the definition of 'permanent teacher' or 'probationary teacher' [within the meaning of the Act.] The reason for this, in my opinion, becomes very evident when one looks at the form of the contract prescribed by the Regulations for a permanent teacher or a probationary teacher.

"Section 3 of such a contract provides:
3. The Teacher agrees to be diligent and faithful in his duties during the period of his employment, and to perform such duties and teach such subjects as the Board may assign under the Acts and regulations administered by the Minister.

"A permanent teachers' contract clearly contemplates that teachers may perform duties other than teaching duties. The fact that the 'co-ordinators' are not assigned teaching duties does not make the duties assigned to them repugnant to the permanent teacher's contract. It is quite consistent with . . . [the *Education Act*] . . . for a person who is legally qualified to teach to be deemed to have entered into a contract including

> the terms of the permanent teacher's contract, although it is understood that the duties of such person will be other than teaching." [*Id.* at 501.]

I come now to the substance of the motions to dismiss. My analysis of the evidence and the law is made solely to determine whether a *prima facie* case exists within the meaning of the complaints. In this regard, I note that there are two complaints. That of Ms. Tomen, dated April 18, 1985, is the earlier and more detailed. Ms. Logan-Smith's complaint is dated April 9, 1988, nearly three years later. In my view, the evidence makes it clear that the two complaints were intended to narrate essentially the same concerns. In cross-examination by Ms. Lennon, the following exchange took place with Ms. Logan-Smith:

> Q. Do you feel that your complaint raises any issues different than those raised by the Tomen complaint?
>
> A. I don't suppose it does.
>
> Q. Why did you file a separate complaint?
>
> A. I believe I stated that yesterday -- that this was something that I believed in very strongly. I had started something. I had gone through the procedures that were expected, and I wished to follow every route that I could in order to achieve or, at least, make an attempt to achieve what I was trying to do.
>
> Q. It still doesn't explain, Ms. Logan-Smith, what you feel having your complaint here adds to Ms. Tomen's complaint.
>
> A. Well, I was under a misapprehension. I had believed that the Human Rights Commission dealt with each case individually. I did not understand that it would be combined with Ms. Tomen's complaint.

My focus as a Board of Inquiry relates to the complaints that have been submitted by the Minister. My focus is not what might be described as collateral matters, such as challenges under the *Charter of Rights and Freedoms* or under corporation law, even though the end result of such actions might render these proceedings moot. Bearing this in mind, and recognizing that I am weighing the evidence only to determine whether a *prima facie* case has been presented, I find that the two complaints are,

as stated, essentially the same: Both Ms. Tomen and Ms. Logan-Smith allege the same denial of *equal treatment* with respect to membership in the OTF, an occupational association, with discrimination because of their sex. More specifically, they, like other female public elementary school teachers, were required as a condition of membership in the OTF to become *statutory* members of the FWTAO, and, as a result, they were denied the right to become *statutory* members of OPSTF.

I move now to the nature of the OTF. In the last paragraph I referred to OTF as an occupational association within the meaning of §5 of the *Code*. It is legislation, the *Teaching Profession Act*, that continued the OTF as a body corporate. Section 3 of that Act sets out the objects of the OTF:

- to promote and advance the cause of education;
- to raise the status of the teaching profession;
- to promote and advance the interests of teachers and to secure conditions that will make possible the best professional service;
- to arouse and increase public interest in eductional affairs;
- to cooperate with other teachers' organizations throughout the world having the same or like objects.

That same legislation continued the constituent parts of the OTF [Affiliates], namely, the Association des enseignantes et des enseignants franco-ontariens, FWTAO, Ontario English Catholic Teachers' Association, OPSTF, and OSSTF. For our purposes, it will suffice to say that the OTF is governed by a Board of Governors and an Executive, to both of which members are elected on a basis of equality as between the five Affiliates. This is true even though the membership of one Affiliate might be significantly greater than another Affiliate.

There is power in the OTF. *As a condition of employment, pursuant to legislation, all teachers are required to be members of the OTF. In addition, subject to the approval of Lieutenant Governor in Council, the Board of Governors of the OTF has been given the power to, among other things, provide a code of ethics for teachers, and to prescribe the compulsory fees to be paid by members of the OTF as well as the times when such monies are to be forwarded to the Federation treasurer.* Regulations have been promulgated under the legislation. The code of ethics has been expressed in terms of member duty to pupils, educational authorities, the public, the OTF, and fellow members. Failure to comply with the code of ethics can result in the laying of a complaint, a formal

hearing, and a recommendation on a finding of guilt by a committee of the OTF that the Minister revoke or suspend the guilty member's teaching certificate, or formally reprimand that person.

The regulations also provide for a formal fee structure that is related to affiliate membership. For our purposes, it will be enough to note the following annual membership fees that teachers *must pay* to the OTF:

- A secondary school teacher: $120 plus 1.0 percent of total annual salary.
- A statutory member of the OPSTF: $50, plus 1.5 percent of the member's total annual salary.
- A female public school teacher
  - (i) working half-time or more: $475
  - (ii) working less than half-time: $237.50.
- A separate school teacher
  - (i) working half-time or more: $505
  - (ii) working less than half-time: $252.50.
- A teacher in a French-language school or class who is a member of L'Association des enseignantes et des enseignants franco-ontariens: 1.5 percent of the teacher's total annual salary.

The facts demonstrate that the OTF is an occupational association and, for many purposes, such as disciplinary action potential, even a self-governing organization within the meaning of section 5 of the *Human Rights Code*. Thus, again with reference to section 5 of the *Code*, it can be said that the Complainants in this matter as teachers have the right to equal treatment with respect to membership in the OTF.

Next, the complaints focus on the relationships that OTF has structured between OPSTF and FWTAO. I emphasize that these are relationships that OTF has structured pursuant to legislation: "Subject to the approval of the Lieutenant Governor in Council, the [OTF] Board of Governors may make regulations . . . (1) providing for the establishment of branches of the Federation or of the recognition by the Federation of local bodies, groups or associations of teachers which shall be affiliated with the Federation." This is not to deny the legislative base, more than 45 years old, that recognized the five constituent groups, such as the OPSTF and FWTAO. Rather, it is to indicate that the definition of the contours of the five groups was placed within the authority of OTF. However, in saying this, it must be understood that it is the Affiliate and not OTF which holds

the power of bargaining agent, in effect, as the union. More will be said about this shortly.

As a corporate entity, equipped with the statutory power, OTF promulgated By-Law 1. The relevant portions of that By-Law in terms of the complaints provide:

> 2.(a) Women teachers teaching all or a major portion of their assignments in an elementary public school or classes shall be members of FWTAO.
>
> . . .
>
> (c) Men teachers teaching all or a portion of their assignment in an elementary school or classes shall be members of OPSTF.

It is this By-law which is the primary object of the complaints. The By-law compels female teachers in the public elementary schools of Ontario to be statutory members of FWTAO with the result that they *must be denied statutory membership in OPSTF.* It follows, as well, that statutory membership not only determines the amount of a teacher's annual membership fees but, more importantly from the viewpoint of the complaints, it results in a flow-back of a major portion of those funds to the originating affiliate from the OTF.

The facts are that neither complainant wanted to be statutory members of FWTAO. They did not want to be identified with a female-only organization. They did not at the time the complaints were filed and they do not now challenge the right of OTF through legislation to compel statutory membership. Rather, they want the opportunity to have their statutory membership ascribed to OPSTF and with that designation to have dues assessed accordingly, even if the end result is the imposition of higher fees.

In this regard, viewing the record as a whole, it is fair to say that both Complainants have not found themselves disadvantaged by their bargaining representative as to the terms and conditions of their employment. In no small measure, the reason goes to the flexibility of Affiliate representation and bargaining processes. The reality in Ontario seems to be that there is joint bargaining by *local branch affiliates of OPSTF and FWTAO.* This often is done through a local Economic Policy Committee, a given number of the members of which are elected by each

branch affiliate. Indeed, using the York Regional Board of Education collective agreement as an example, the recognition clause states in part: "The Board recognizes the branch affiliates as the sole and exclusive bargaining agents for teachers as defined in Article 8 . . . . and further recognizes the negotiating committee of the Economic Policy Committee of the branch affiliates as competent to represent all of the Elementary Teachers employed by the Board and to negotiate on their behalf." The net result of this process is that the collective agreements for the OPSTF and FWTAO provide for precisely the same terms and conditions of employment within the meaning of any collective agreement.

It is possible, too, should the branch affiliates within any local region so agree, for amalgamates to be formed which can be permitted to represent the affiliates. The evidence indicates that thirteen such affiliates existed in the province in 1989. Indeed, as a matter of law, Bill 127 requires combined bargaining as to central issues for Metropolitan Toronto. Though no illustration was offered, it is theoretically possible for there to be individual bargaining by the branch affiliates. I emphasize, however, that this is a theoretical possibility insofar as the evidence to the date of the motions to dismiss is concerned.

Counsel for the complaints vigorously argued that there were points of material and *objective* differences resulting from assigned statutory membership in relation to voluntary membership. Perhaps the most important point in this regard was made by Mr. Juriansz who referred to Article 5, §2(a) of the OPSTF Constitution which provides: "The rights, privileges and responsibilities of a Voluntary Member shall be the same as those of a Member but the extent of provision of the following services shall be available to Voluntary Members only by approval of the Executive following consultation with the District: (i) Tenure services; (ii) Financial support in the event of a strike." No evidence was offered concerning the extent to which the indicated services had ever been denied.

Yet, the fact remains that the scope and meaning of these limitations as well as others alluded to by Counsel for the Complaints were derived from a reading of underlying documents, such as the Constitution of the OPSTF, submitted collective agreements, and an application of labour jurisprudence as presented by Complaint counsel in their closing arguments on the motions to dismiss. There was no direct personal evidence offered to demonstrate that holding Voluntary Membership in OPSTF and the denial of Statutory Membership in that body resulted in or was likely to result in any real material and objective detriment. For

example, Ms. Logan-Smith, a teacher who, as we shall see, has been active in labour relations in her profession, testified:

> Q. And you were aware that OPSTF already gave you all the rights and privileges of membership in its organization?
>
> A. Yes.

Ms. Logan-Smith provided an earlier and more detailed explanation as to her concerns in being denied OPSTF statutory membership. In a letter dated December 14, 1987, directed to Mrs. M. Wilson, Secretary-Treasurer of OTF, appealing the denial of statutory membership in OPSTF, Ms. Logan-Smith stated in part:

> As a woman, I find it offensive and distressing that I am assigned to an affiliate because of my sex. OPSTF represents and protects public elementary school teachers without discrimination, and adheres to the philosophical beliefs embodied in the Canadian Charter of Rights and Freedoms. *I am allowed all of the rights and privileges of OPSTF as a voluntary member; however, my fees are directed to an affiliate which I feel does not represent my philosophies and beliefs and whose services I do not wish to use.*

Considerable attention was given to the matter of membership fees or dues. I believe the subject must be discussed in relation to the motions to dismiss. Mr. McGee in his submissions concerning the motions to dismiss put the matter clearly:

> It is clear from evidence such as that given by Ms. Logan-Smith that she has all of the advantages of both FWTAO and OPSTF. In Exhibit 30 under the heading of "Collegiality" she refers to the fact that she participates fully and with confidence in OPSTF. In her submissions contained both in Exhibit 30 and Exhibit 27 she raises the issue of disadvantage and her answer in those documents is that she cannot, she does not want to be paying her fees to FWTAO and, in the final analysis, that is what this case is all about. It is not about disadvantage . . .
>
> This is part of a long-standing, stated objective of the organization of which both Margaret Tomen and Linda Logan-Smith are members, of consolidating all of the teachers'

organizations. To this end, the OPSTF has permitted members of FWTAO to become members of their organization. The evidence is that this is one step toward the consolidation of the bargaining units, but what stands in the way of that consolidation is the direction of fees and that is why in Exhibit 30 and in Exhibit 27 you see the reference to the fact that the complainants do not want their fees directed toward FWTAO.

In her appeal to the Executive of the OTF asking to change her statutory membership, Ms. Logan-Smith declared: "It has been stated that women like myself, that is, with statutory FWTAO membership and voluntary OPSTF, have the best of both worlds. In my case, it might be added that being a member of a local amalgamate should also eliminate any concern. However, when my fees are paid to an organization whose priorities are different than my own, and whose policy is offensive to me, when I am identified in the public eye with that organization, I do not consider that I have the best of both worlds. When my fees are being used to duplicate services that I receive from another organization, I am resentful." On questioning by Ms. Lennon, there was little doubt that the payment of fees to FWTAO constituted a major concern of Ms. Logan-Smith:

> Q. . . . Now I take it [from the statement quoted], the issue of where the fee goes -- how the fee is dealt with -- is critical to you?
>
> A. It's a big part of it.

But what is the relevance of the fee paid to FWTAO to the complaints? The following points seemed to have been made by Counsel opposing the complaints:

> 1. Factually, the essence of the complaints has little to do with the *Human Rights Code*. Rather, to put it bluntly, the complaints at their root are no more than a raid by one union, OPSTF, on another, FWTAO. Allow for a change of statutory membership from FWTAO to OPSTF and there will be a flow of funds to enhance the relative position of OPSTF which would be vying for the same bargaining unit membership.
>
> 2. The complaints are *not* directed against FWTAO as a party respondent. They are directed against the OTF and OPSTF. Any violation of the *Code* must be grounded in action taken by

either OTF or OPSTF. The reality is that OPSTF can set its own membership fees. And the fee schedule set for Voluntary Members results in a lower fee than they would otherwise have to pay if they were statutory members of OPSTF.

These points are reflected in the efforts made by Ms. Tomen and Ms. Logan-Smith to change their statutory membership from FWTAO to OPSTF. Both were voluntary members of OPSTF, one of several membership categories of that organization. As such, they both were active members of OPSTF. Their voluntary membership status for which OPSTF charged only $25 annually did not inhibit their obtaining and holding positions of responsibility within the organization. As such, Ms. Tomen began as early as 1980 as Area No. 1 Representative, Essex District, to the OPSTF. From 1985 to 1987, she was President of the Essex District, OPSTF as well as being a Delegate to the Annual General Meeting of the OPSTF. This is only a partial listing of positions held by Ms. Tomen in OPSTF.

Ms. Logan-Smith served as President of amalgamate Elementary Teachers' Association of York Region from 1986-1988. She was a delegate to the Regional Assembly for York Region of FWTAO from 1984-1987. From 1986-1987, she was a participant of the OPSTF Council of District Presidents. She was an Alternate Delegate to the OPSTF Annual Meeting in 1987; a Member of the OPSTF Professional Development Committee (1987-1988), and a participant in the OPSTF Council of District Presidents (1987-1988). As with Ms. Tomen this is only a partial listing taken from Ms. Logan-Smith's curriculum vitae.

The complaint of Ms. Tomen states that the By-Law "renders it impossible for a female to be a full member of OPSTF." For reasons already given, I find that the complaint of Ms. Logan-Smith essentially makes the same claim. In fact, on April 18, 1985, Ms. Tomen wrote to R. Ross Andrew, Secretary of OPSTF, applying for admission as a statutory member. Among other things, Ms. Tomen explained her understanding of statutory membership: "By 'statutory member' I mean a member with all the rights and privileges allowed to any other member, male or female, by all relevant legislation, regulations and by-laws in this matter, *including the right to have all my membership fees paid to OPSTF and to have OPSTF bargain collectively on my behalf.*" [Emphasis added.]

The request of Ms. Tomen was rejected by letter from Mr. Andrew dated April 22, 1985: "The Executive of OPSTF has considered your application and resume carefully. All other things being equal, the

Executive would like to be able to admit you to statutory membership, particularly in view of your long teaching experience and contribution to OPSTF as a voluntary member. Unfortunately, the Executive is bound by the Teaching Profession Act and regulations and in particular, s. 2 of Bylaw No. 1 of the OTF, which provides that female teachers who teach all or a major portion of their assignment in an elementary public school must be statutory members of FWTAO. Similarly, statutory membership in OPSTF is limited to male public elementary school teachers. Were it not for these rules, the Executive would be pleased to extend statutory membership in OPSTF to you. However, in the circumstances, we must regretfully reject your application. You may, of course appeal the application of s. 2 of Bylaw 1 to the OTF Executive, pursuant to s. 7 of OTF Bylaw 1."

Ms. Tomen appealed to the OTF and, by letter dated June 12, 1985 signed by James Carey, OTF Executive Assistant, that appeal was rejected. Mr. Carey wrote Ms. Tomen in part:

> Your membership appeal was presented to the OTF Executive . . . The Executive resolved to refer your appeal to FWTAO and OPSTF for study and report to the OTF Executive . . . .
>
> This action was taken and the two Affiliates involved, reported to the Executive at its meeting of May 24, 1985. FWTAO reported that it did not support the transfer and OPSTF indicated that it was in favour of the transfer of membership. A motion was placed before the Executive indicating support for your transfer of membership to OPSTF. This motion failed to receive the appropriate support.
>
> At this time, I must report to you that your appeal pursuant to section 7 of OTF By-law 1, respecting the application of Bylaw 1, to an application for statutory membership in OPSTF has been denied by the OTF Executive.

Ms. Logan-Smith took a somewhat different approach in her attempt to change her statutory membership from FWTAO to OPSTF. She did not directly petition OPSTF for membership. Rather, by letter dated December 10, 1986 to Doug McAndless, President of OTF, she went directly to that organization with a request to become a statutory member of OPSTF. A copy of that letter was noted as having been sent to the President of OPSTF. That letter stated in part:

> Under the current terms of OTF By-law 1, I have been assigned statutory membership in the Federation of Women Teachers' Association of Ontario. I request that my affiliate membership be changed so that I can become a statutory member of the Ontario Public School Teachers' Federation. I wish to change my Affiliate membership as I believe that OPSTF better represents my philosophies and beliefs as a public elementary teacher, and to continue to assign Affiliate membership on the basis of sex is anachronistic and discriminatory. My request is not meant to propose the elimination of mandatory membership within OTF, but simply that I have the right to choose my public elementary affiliation.
>
> I understand that my request may be granted by the Ontario Teachers' Federation under the provisions of OTF By-law 1, Membership, section 7, which states, "The application of this By-law (By-law 1, section 1 through 6) may be appealed to the OTF Executive."

In the result, Ms. Logan-Smith's application for change of statutory membership was considered by the OTF Executive and rejected on June 23, 1987. Following an appeal and a personal presentation by Ms. Logan-Smith, the application for change of statutory membership was rejected again on March 1, 1988. A further appeal was made to the OTF Board of Governors which consists of ten members from each Affiliate. A motion was made to have the OTF Executive reconsider the request of Ms. Logan-Smith for change of statutory membership. Another motion was made to table the question. The motion to table was approved with the result that Ms. Logan-Smith's appeal has in fact been stayed.

Ms. Lennon explored with Ms. Logan-Smith in cross-examination the nature of the OTF fee structure. In doing so, reference was made to the *Teaching Profession Act* and the OTF by-laws. The conclusions I derived from the examination are as follows:

> 1. Each Affiliate, pursuant to its own rules but in accordance with democratic procedures, formulates a recommended fee schedule for its membership.
>
> 2. That fee schedule is forwarded to the OTF and, if approved, is then submitted to the Lieutenant Governor in Council to be adopted and promulgated as a regulation. There was no

indication that any fee schedule proposal offered by an Affiliate had ever been disapproved by OTF.

3. The finalized fee is mandatory, and it is paid by each teacher subject to its terms. The payment is directed to the OTF; it is not directed to the teacher's Affiliate. However, a portion of the fee that Ms. Logan-Smith thought represented the greater portion of the monies paid, but the exact amount of which was not provided in evidence, is then given over by the OTF to the Affiliate.

4. There need not be any commonality in the fee schedule set by each Affiliate. And, indeed, there are differences to be found in the fee schedules for regular members as between Affiliates.

5. The OPSTF could establish a higher fee for voluntary members. Within the OPSTF, the question of establishing a higher fee was debated; a proposal was made to increase the fee, and it was defeated. Ms. Logan-Smith explained why. She stated: "The fact is that our [OPSTF] voluntary members already pay $475 to OTF to be directed toward FWTAO. That is more than many of our OPSTF statutory members pay, particularly beginning teachers. Beginning teachers have very low salaries. For a young teacher, to raise the fee would be undue hardship."

There is little question in my mind, based on the evidence heard to date, that the Affiliates have a significant influence in the final fee their members will pay to OTF, important portions of which flow back to fund the Affiliates. Nor is there any real doubt, again based on the evidence thus far presented, that the OPSTF fee schedule for voluntary members has been set at a level which will encourage affiliation on the part of FWTAO statutory members.

The reason for such encouragement can be found in the Constitution of the OPSTF. Under Article III - Objects, the OPSTF has bound itself to: "(9) promote as a long-term goal the unification of all teachers in the Province of Ontario into a single unified body without affiliates (1983). [and] . . . (12) to promote voluntary membership in OPSTF (1985)." To carry out these objects, a committee was struck. The terms of reference of that committee were "to actively promote the unification of all teachers teaching all or a major portion of their assignments in the public

elementary schools in which English is the language of instruction into a single unified affiliate." Ms. Logan-Smith testified:

> Q. And, if I am reading this correctly, and you can tell me whether you read this in the same way: No. 1 is the immediate goal of a single unified affiliate for public elementary teachers, and No. 2 is a longer term goal of one group representing all teachers in Separate Schools, in Francophone schools, in secondary schools, as well as elementary schools.
>
> Is that the way you read it?
>
> A. One is a short term goal and one is a long term goal.
>
> Q. Do you share both those goals?
>
> A. Yes, I do.

The organization that would represent all Ontario teacher interests would be the OTF. In effect, it would become a bargaining agent for all teachers. The five affiliates would cease to perform this role; they would no longer function as bargaining agents. Any significant change in the existing method for determination of affiliate dues and their allocation might have an important impact on bargaining unit status. I recognize this. I am sensitive to the labour relations implications of these proceedings.

Yet, at the same time, I must emphasize the obvious: I function as a Board of Inquiry and, as such, I am charged with examining the complaints made under the *Human Rights Code*, which constitutes general legislation. The relevance of fee allocation in these proceedings, it seems to me, goes to two points:

> 1. Were the proceedings initiated in good faith?
>
> 2. Did the Complainants suffer any detriment as a result of having a portion of their membership fees to OTF paid over to FWTAO?

At this point in the proceedings, I am not prepared to say that the complaints were initiated in bad faith, and by that I mean with the primary view on the part of the Commission and the complainants of facilitating a raid on one union by another. This is not to deny that OPSTF

obviously would benefit from an order which would allow a statutory member of FWTAO to transfer such membership to OPSTF and with it dues payment and allocation under the existing OTF structure. Nor is it to deny the obvious organizational interest and support that OPSTF has given to the complaints and the Complainants, including the provision of counsel in these and other related proceedings.

Rather, it is to say that the Complainants, while they have spoken of their desire for a single bargaining representative, have made it clear that their reason for asking to transfer their statutory membership to OPSTF from FWTAO is because they want to be statutory members of a mixed gender union. They want their fees as statutory members allocated by OTF to OPSTF. They were denied statutory membership in OPSTF not because the organization did not want them. Indeed, the opposite is true; both Complainants had and continue to have strong links with OPSTF. They were denied that statutory membership because OTF By-law 1 requires that they as women public school teachers have a statutory affiliation with FWTAO.

The evidence thus far, including the demeanor of the Complainants, lead me to believe that they initiated these complaints because they held at the time and continue to hold the sincere belief that they are denied equal treatment in their inability to become statutory members of OPSTF solely because of their sex. I note, in this regard, that neither the Complainants nor the Commission seek in any way in these complaints to alter the five-affiliate structure of the OTF. Ms. Logan-Smith stated: "My wish to have my statutory affiliate membership changed from FWTAO to OPSTF, and my reasons for actively seeking this change, are mine alone; I do not pretend to speak for anyone else, and I am not trying to change the current five-affiliate structure of OTF." That understanding, namely, that the complaints in no way are to be construed as an attack on the five-affiliate structure, and more specifically on the right of FWTAO to limited its membership to females, is embodied in an agreement by counsel made at the start of these proceedings. The thrust of the complaints before this Board of Inquiry go to compulsory statutory membership by FWTAO which precludes consenting statutory membership in OPSTF and with it the allocation of statutory fees.

Next, there is the matter of detriment to the Complainants as a result of the statutory fee allocation. In the result, as I indicated before, the Complainants pay less as Voluntary Members of OPSTF than they would if they were Statutory Members of that organization. I indicated, too, that as Voluntary Members, as a practical matter, they believed themselves not to

be disadvantaged in relation to Statutory Members of OPSTF. Their real concerns were twofold: (1) They saw themselves as "second class citizens." That meant they saw themselves as not paying their full share to OPSTF. As Voluntary Members with, from a practical standpoint, all of the rights of Statutory Members, they were paying but a fraction of the membership fees. However, as those opposing the complaints emphasized, there was no legal barrier to OPSTF raising its Voluntary Membership fees. (2) Because they could not become Statutory Members of OPSTF and have been compelled to remain Statutory Members of FWTAO, their statutory dues have gone to an organization (FWTAO) of which they do not want to be a part, an organization whose Constitution is in no small part gender-directed. (See, Article III - Objects, Paragraphs b, d.) The Complainants see themselves as not in need of special assistance or protection because of their sex. More particularly, they see themselves better nurtured professionally in a mixed gender union, namely, the OPSTF. They see themselves disadvantaged, that is, not being treated on an equal basis with other public school teachers by being compelled to have their statutory fees paid into a gender-centred union, the FWTAO.

It is the second point only, at this stage of the proceedings, which may have some validity: The Complainants are not compelled to pay more to hold the same material benefits from a practical point of view as the Statutory Members of OPSTF. Indeed, they pay less. However, the OPSTF has the power to change the fee structure through recommendation to the OTF, and through it to the Lieutenant Governor in Council. This is unlikely to occur so long as OPSTF continues in pursuit of its unification goal. However, solely because they are women public school teachers, the Complainants are required to pay statutory fees to FWTAO. This, for example, is not required of women teachers in OSSTF who are part of a mixed-gender union. The detriment to the Complainants is that a portion of money in the form of dues, as a matter of compulsion, goes to an organization whose purposes and causes they do not want to support. Another way of expressing this is to say that the Complainants have put forward injury to their dignitary interests.

Through cross-examination of the complainants, considerable evidence was submitted by those opposing the complaints as to the disadvantages by female teachers and, in that regard, the need for special efforts to overcome those disadvantages. Some of that evidence consisted of documents, such as *The Status of Women and Affirmative Action/Employment Equity in Ontario School Boards, Report to the Legislature by the Minister of Education (1986).* I was somewhat unsure of

the purpose(s) to be served by such evidence. (1) On the one hand, it seemed to test the knowledge of the Complainants as to the position of female teachers in the Ontario school system and, more generally, to women in the labour force. And, related to that, it seemed to challenge their understanding of the need for an organization which has an important purpose furthering the position of female public school teachers. (2) There was perhaps an intent on the part of those opposing the complaints to use that evidence to establish that which would be necessary for a section 13 defence under the *Code*.

(1) Both Complainants, in the final analysis, seemed to say that they could acknowledge some difficulties under which female teachers might function in the Ontario school system (as well as perhaps more generally). These difficulties include: sexual harassment; bearing an unequal share of childcare and household responsibilities; and holding significantly fewer positions of added responsibility such as that of principal. Neither Complainant, however, could accept an individual need on her part for an organization such as FWTAO. Ms. Logan-Smith, having been given a series of statistics in cross-examination relating to disadvantages faced by female teachers, stated:

> I have expressed my concern about statistics. I do not -- personally I can't buy into what is being said but were I to do so . . . [I]f we are talking in relation to my complaint here, I do not believe that a separate sex organization which is segregated from the other organizations is the way to improve the situation.

Neither Complainant, in my view, has been held out or is qualified as an expert either in feminist theory or the status of women as teachers in Ontario. Neither can nor should be expected to testify or be subject to challenge as to credibility as to these points. The facts are, at this point in the record, that each Complainant brought forward her complaint as an individual. And, on my understanding of the facts, those complaints were brought forward in good faith.

I repeat that neither Complainant challenges the right of FWTAO to retain a membership limited to women. Rather, the Complainants challenge the right of the OTF to *compel* statutory membership in FWTAO by female public school teachers and thereby deny OPSTF the right to accept such persons as statutory members. It would follow that FWTAO is free to pursue its constitutional objectives that include promoting the interests

of female public school teachers.

(2) Clearly, a section 13 defence was not established, assuming this was the intent of those opposing the complaints. It is enough to say at this point that the evidence went to the proof of disadvantages faced by women in the work force and more particularly as teachers in Ontario. It also went to governmental recognition of these facts and, in that regard, governmental undertakings, in part, through affirmative action/employment equity programs to correct the disparities found. The precise role of FWTAO in these matters and, more particularly, the need for FWTAO to require compulsory statutory membership as an incident toward fulfilling its role was not presented in the evidence.

IV
The Law Relating to Discrimination

Counsel opposing the complaints argued that there can be no violation of §5 of the *Code* without a finding in *law* of discrimination. The question is not purely one of fact. I agree. I accept the reasoning in *Saskatchewan Human Rights Commission and Michael Huck v. Canadian Odeon Theatres Limited*, 6 C.H.R.R. D/2682 (Saskatchewan Court of Appeal, 1985) where it was stated at ¶22172:

> The word discrimination is not defined in the [Human Rights] *Code*. It is a word of some complexity and can have a number of meanings depending on the context in which it is used. In the field of human rights legislation, the term embraces a concept which is not necessarily the same as in other fields of endeavour. The meaning of the word *discrimination* or the phrase *to be discriminated against* in the context of this statute is not a word or a phrase which is capable of reduction to further simplicity. It is a word or a phrase which requires interpretation and in my opinion it is a question of law. Bayda C.J.S. in *Peters v. University Hospital Board*, [1963] 5 W.W.R. 193, dealing with the identical issue, stated at page 198:
>
> > "The question whether the scope of the term *discrimination* used in § 4(1) of the Act embraced those words and that statement of policy, or, put another way, whether those words and that statement were capable of constituting

> discrimination within the meaning of the Act, was a question of law."
>
> Accordingly, the determination of whether there was discrimination involves a question of law . . . .

Before proceeding further with the criteria that go to make up a finding in law of discrimination, I think it necessary to deal with two points. One was developed by Mr. Cavalluzzo and the other by Mr. Forbes. Mr. Cavalluzzo stated that the issues raised in this case were settled by the decision of the Ontario Court of Appeal in *Lavigne v. Ontario Public Service Employees*, [1989], 31 O.A.C. 40. There, Lavigne, a community college teacher and a member of the bargaining unit, but not a member of the union, brought a *Charter* challenge for the compulsory check-off of a portion of union dues used for non-union purposes. The Court of Appeal dismissed that challenge. At pages 63-64, the court held:

> Putting Lavigne's position at its highest, we shall assume, without deciding the point, that a negative freedom of association is constitutionally protected by s. 2(d). On that assumption, we are nonetheless of the opinion that the simple requirement of a monetary payment to OPSEU is not violative of his freedom not to associate. The compelled payment does not curtail or interfere with any aspect of Lavigne's freedom of non-association or the interests protected thereby. His right not to associate remains unimpaired. He is not forced to join the union; he is not forced to participate in its activities; and he is not forced to join with others to achieve its aims. The compelled payment does not identify him personally with any of the political, social or ideological objectives which OPSEU may support financially or otherwise; nor does it impose any obligation on him to adopt or conform to the views advocated by the union.
>
> . . .
>
> The respondent's payment to the union under the agency shop agreement cannot be construed as placing his stamp of approval on anything done by the union or on any cause to which it might contribute. His individual freedom to associate or not to associate with others, both in opposition to OPSEU and the causes it seeks to advance, remains unfettered by the payment;

> He remains free to pursue his personal goals. The interest he may have in being left alone or in being unencumbered by any monetary obligation to the bargaining agent selected by the majority of the bargaining unit or in not having any part of his payment to the union, no matter how trivial or insubstantial, devoted to purposes unacceptable to him is not, in our view, an interest of constitutional status entitled to protection under the *Charter*.

Lavigne, in my opinion, assumes the answer to the very question central to these complaints: It was appropriate for the respondent, Lavigne, to be *compelled to be a member of the bargaining unit*. It was in that legitimate context that, according to the Rand formula, he was required to pay union dues. In the complaints before me, the question is whether the Complainants can be compelled to remain statutory members of FWTAO, and thereby be precluded from becoming statutory members of OPSTF solely by reason of their sex. Incident to that statutory membership on the facts of the record to date is the requirement of the payment of a fee initiated by the statutory affiliate, payable to the OTF, but a portion of which is returned to the designated affiliate. Accordingly, at this point in the proceedings, I do not find *Lavigne* dispositive of the issues raised in the complaints.

A different concern was raised by Mr. Forbes. He stated that there can be no finding of discrimination if the criteria going into the definition have been satisfied but the net injury is "trivial or insubstantial." [See, *Jones v. The Queen*, [1986] 2 S.C.R. 284, *per* Wilson, J. at p. 314, cited in *Edwards Books and Art v. The Queen*, [1986] 35 D.L.R. (4th) 1, at p. 35.] I accept the proposition. However, at this point in the proceedings, the Complainants have demonstrated a dignitary interest affected by compulsory statutory membership in FWTAO which precludes statutory membership in OPSTF solely because of their sex. In my view, injury to such an interest is not trivial or insubstantial.

I now will deal with my understanding of discrimination for purposes of the complaints. Those opposing the complaints state that differentiation alone is not sufficient for there to be discrimination on the basis of sex within the meaning of section 5 of the *Code*. Messrs. Forbes and McGee discussed at some length a number of recent decisions of the Supreme Court of Canada which in their view require a showing of *actual or real injury* for there to be a finding of discrimination. (I will discuss these cases shortly.) Ms. Lennon carried that argument forward in

terms of possible hurt and/or subjective harm:

> Ms. Lennon: [P]ossible harm would have to be real rather than perceived. It would have to be grounded in real life and real facts. In other words it would have to be actually proved by evidence before you. . . .
>
> . . .
>
> The Chairman: As a principle . . . could subjective feelings form a basis for discrimination?
>
> Ms. Lennon: In my submission subjective feelings of discrimination could not form the basis for a finding of discrimination, of actual discrimination under the *Code*, and it's a finding of actual discrimination that you have to make. That is not to say that dignitary interests are protected under the *Code*, but you still have to find *actual discrimination*.
>
> The Chairman: In order for those interests to come into play?
>
> Ms. Lennon: That is right. So, in the context of this legal principle of discrimination which requires a showing not just of distinction but also *of burden or prejudice*, what are the facts before you?

Again, regardless of the hurt or harm claimed, possible or subjective, it is the view of Counsel opposing the complaints that real, measurable (and generally economic) effects of the differentiation must be shown for there to be discrimination in law.

I have considered carefully their arguments and, for purposes of the motions to dismiss, I must respectfully disagree. In the first instance, I must draw my interpretation of the law from the *Code* itself and, more particularly, section 5. In that regard, the language of the *Code* must be given a construction which will advance its broad purpose. In *Re Ontario Human Rights Commission and Simpson-Sears Ltd.*, [1985] 23 D.L.R.(4th) 321 McIntyre, J., for the Supreme Court of Canada, stated, having referred to the Preamble to the Ontario Human Rights Code:

> There we find enunciated the broad policy of the Code and it is this policy which should have effect. It is not, in my view, a

> sound approach to say that according to established rules of construction no broader meaning can be given to the Code than the narrowest interpretation of the words employed. The acceptable rules of construction are flexible enough to enable the court to recognize in the construction of a human rights code the special nature and purpose of the enactment . . . . and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary -- and it is for the courts to seek out its purpose and give it effect. The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of of the action complained of which is significant. If it does in fact cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory. [*Id.*, at pp. 328-329.]

What then are the interests that the *Code* protects? After all, the broad reading given the *Code* is in relationship to designated interests. Those opposing the complaints, in my view, have couched the language of protection largely in terms of economic interests: Unless the discriminatory act results in a real injury or a real threat to economic interests of the individual victim, there is no discrimination.

In that regard, reference was made to several recent decisions of the Supreme Court of Canada. I do not question these decisions, as such. However, I believe they have limited application to the facts of the complaints before me. Let me begin with *Andrews v. Law Society of British Columbia*, 91 N.R. 255 (1989). Andrews, a permanent resident of Canada and a British subject, was denied admission to the practice of law in British Columbia solely because he was not a Canadian citizen as required by that province's *Barristers and Solicitors Act*. Andrews sought a declaration that that portion of the Act violated the equality provisions of section 15 of the *Charter of Rights and Freedoms*. A majority of the Court agreed with his claim, though it is interesting to note that McIntyre, J. dissented not on the basis of the principles that went into the decision, but rather on the application of those principles.

In my view, the underlying issue for the Court to determine was

whether Andrews stood as a member of a *protected group within the meaning of section 15 of the Charter*. The reason for this inquiry was that non-citizens were not an *enumerated group entitled to protection within the meaning of section 15*. It was necessary to ascertain the extent to which the group claiming protection was disadvantaged, that is, to gage the effects of the challenged discrimination. Wilson, J. found that section 15 could be *expanded to included analgous groups and that, on the facts of the case, non-citizens were entitled to protection*. She stated:

> I would conclude therefore that non-citizens fall into an analogous category to those specifically enumerated in s. 15. I emphasize, moreover, that this is a determination which is not to be made only in the context of the law which is a subject of challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society. While legislatures must inevitably draw distinctions among the governed,such distinctions should not bring about or re-enforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others.

It is also true, however, that Wilson, J. referred to the dissent of McIntyre, J. with which she said there was agreement in principle. Counsel for those opposing the complaints cited Justice McIntyre's opinion for the proposition that for individuals to be in a protected group, *enumerated or otherwise*, there first had to be a demonstrated adverse economic effect. McIntyre, J. explained different approaches necessary to make a finding of discrimination. In an already lengthy opinion, I do not think it necessary to detail the approaches he rejected. Rather, I will focus on what he found acceptable:

> However, in assessing whether a complainant's rights have been infringed under s. 15(1), it is not enough to focus only on the alleged ground of discrimination and decide whether or not it is an enumerated or analogous ground. The effect of the impugned distinction or classification on the complainant must be considered. Once it is accepted that not all distinctions and differentiations created by law are discriminatory, then a role must be assigned to s. 15(1) which goes beyond the mere recognition of a legal distinction. A complainant under s. 15(1) must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection accorded by

the law but, in addition, must show that the legislative impact of the law is discriminatory.

> Where discrimination is found a breach of s. 15(1) has occurred and -- where s. 15(2) is not applicable -- any justification, any consideration of the reasonableness of the enactment; *indeed, any consideration of factors which could justify the discrimination and support the constitutionality of the impugned enactment would take place under s. 1. This approach would conform with the directions concerning the application of s. 1 and at the same time would allow for the screening out of the obviously trivial and vexatious claim. In this, it would provide a workable approach to the problem.* [Emphasis added.]

As I read the statement of Justice McIntyre, he does indeed require a showing of effect whether the grounds are enumerated or analogous for there to be a threshhold finding in law of discrimination. What he meant by *effect*, however, is different from the position urged by those opposing the complaints: (1) Nothing said by McIntyre, J. foreclosed a finding of the requisite effect by recognizing the impact of the questioned practices on a complainant's dignitary interests. (These are interests which, I believe, Counsel opposing the complaints probably would characterize as subjective.) I have made it clear, based on the evidence thus far presented, that it is the dignitary interests of the Complainants which are affected. (2) McIntyre, J. emphasized in the portion quoted above that the effect-qualification was needed to weed out "the obviously trivial and vexatious claim." Implicit in this was the need for the Court to determine that the interest affected was real. Once this had been done, then, assuming the non-application of section 15(2), the justification for the *prima facie* discriminatory act would be tested under section 1 of the *Charter*. Again, as applied to the facts in the matter before me, for reasons already given, based on the record to date, the claims are not trivial or vexatious.

Three months after *Andrews*, on May 4, 1989, the Supreme Court of Canada handed down three decisions, all of which related to the definition of discrimination within the meaning of section 15 of the *Charter*. Each of the decisions was cited by Counsel opposing the Complaints in support of their position that, in addition to an enumerated subject, there must be a demonstrated objective effect for the act to be considered discriminatory. I will deal with the three decisions. In my view, none of them diminishes the construction that I have put on Justice McIntyre's definition of discrimination. I mention Justice McIntyre's definition discrimination

because each of the three decisions cites that definition with approval. The first decision to be discussed is *Turpin v. The Queen* where the reasons of the Court were provided by Wilson, J.. The other two decisions were *Brooks v. Canada Safeway Limited* and *Jenzen v. Platy Enterprises Ltd.* The reasons of the Court were given by Chief Justice Dickson.

In *Turpin*, one issue before the Court was whether sections 429 and 430 of the *Criminal Code*, as they read in May 1985, deny the equality provisions of section 15 of the *Charter*. In Ontario, in 1985, a jury trial was required in murder cases. However, in Alberta, a jury trial could be waived. For our purposes, it is enough to say that the Court found that one of the enumerated basic equality rights of section 15 had been violated with the result that there was a denial of equality before the law: The Appellants were treated more harshly in Ontario than those charged facing the same offence in Alberta, who had the opportunity to be tried by a judge alone, if they deemed this to be of advantage.

This finding was not enough to establish a violation of section 15. The Court had to move to the next step and determine whether the denial resulted in discrimination. "The internal qualification in s. 15 that the differential treatment be 'without discrimination' is determinative of whether or not there has been a violation of the section [15]. It is is only when one of the four equality rights has been denied with discrimination that the values protected by s. 15 are threatened and the court's legitimate role as the protector of such values comes into play."

In effect, the appellants sought to be defined as a group discriminated against. In that regard, they were in exactly the same position as all other persons charged with the offences in Canada with the exception of Alberta. There alone was the right afforded to waive a jury trial. Wilson, J. cited and quoted from McIntyre, J.'s opinion in *Andrews*: It is necessary to identify the personal characteristics of the individual or group resulting in a distinction. Then it is necessary to define the effect of such distinction in the sense of imposed burdens, obligations or disadvantages.

Wilson, J. then stated: "In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context . A finding that there is discrimination will, I think, *in most but perhaps not all cases*, necessarily entail a search for disadvantage that exists apart

from and independent of the particular legal distinction being challenged." The Court declined to find the requisite discrimination for an infringement of section 15.

The analysis required, said Wilson, J., looks to categorization -- for purposes of section 15 -- as an analytic tool used to determine whether the interest advanced is one intended to be protected by the *Charter*. The interest sought to be protected by the appellants in *Turpin* was not one expressly recorgnized by section 15 (enumerated). A broader search was undertaken by the Court to find whether the interest claim fell into an analogous group, a search in principle similar to that undertaken in *Andrews*.

Sometimes, however, Wilson J. indicated, that search might be unnecessary. My suggestion is that the search might be unnecessary where the group and the interest affected have been clearly defined by legislation. To a considerable extent, this is precisely what has been done in the *Ontario Human Rights Code*. Section 5 of the *Code* specifically identifies the interest, which for our purposes is the right of every person to equal treatment with respect to membership in a trade union or occupational association without discrimination because of sex. The interest affected is defined by public policy through legislation. Interpretation of section 5 requires that the interest affected not be trivial or frivolous.

The *Code* provides a means for defining or measuring the effects of factual discrimination. One such measure for which damages can be provided is injury to the dignitary interests of the individual. This is no secondary subject to which damages attach after so-called objective injury has been proved. The preamble to the *Code* which the Supreme Court of Canada through the opinion of McIntyre, J. fully quoted in defining the nature and purpose of the legislation in *Simpson-Sears Ltd.* places dignitary interests in a primary position:

> Whereas recognition of the *inherent dignity* and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;
>
> And Whereas it is the *public policy in Ontario that every person is free and equal in dignity and rights* without regard to

> race, creed, colour, *sex*, marital status, nationality, ancestry or place of origin . . . .

I have found as a fact, on the basis of the record to date, that such injury occurred. Using the standards set by Wilson, J. and McIntyre, J., I believe the requisites for a finding of discrimination in law have been satisfied in the context of the motions to dismiss.

I noted that two other decisions were handed down by the Supreme Court of Canada on the same day as *Turpin*. Chief Justice Dickson gave the reasons for the Court in each instance. At issue in the two cases was the application not of the *Charter* but the *Human Rights Act of Manitoba*. In *Brooks v. Canada Safeway Limited*, not reported at the time of this Award, the question was whether different treatment under a company health plan for employees unable to work because of their pregnancy as contrasted to those on sick leave constituted sex discrimination under the provincial Human Rights Act.

The Court treated with the question of discrimination first; then, having found discrimination on the basis of pregnancy, it asked whether this was a finding of sex discrimination. The answer to both questions was affirmative. In reaching these conclusions, the Chief Justice expressly gave the Human Rights Act a wide reading that would carry forward its underlying purpose of equality. He cited and quoted from *Simpson-Sears Ltd.*.

Once again, as to the definition of discrimination, the Court turned to the opinion of McIntyre, J. in *Andrews*. The Chief Justice rejected the company argument of classifying pregnancy as a disability rather than an illness, and therefore not eligible for health plan benefits. He looked to the purpose of the health plan and found that it should encompass pregnancy:

> The underlying rationale of this plan is the laudable desire to compensate persons who are unable to work for valid health-related reasons. Pregnancy is clearly such a reason. By distinguishing "accidents and illness" from pregnancy, Safeway is attempting to disguise an untenable distinction. It seems indisputable that in our society pregnancy is a valid health-related reason for being absent from work. It is to state the obvious to say that pregnancy is of fundamental importance in our society. Indeed, its importance makes description difficult. To equate pregnancy with, for instance, a decision to

> undergo medical treatment for cosmetic surgery -- which sort of comparison the respondent's argument implicitly makes -- is fallacious. If the medical condition associated with procreation does not provide a legitimate reason for absence from the workplace, it is hard to imagine what would provide such a reason. Viewed in its social context, pregnancy provides a perfectly legitimate health-related reason for not working and as such it should be compensated by the Safeway plan. In terms of the economic consequences to the employee resulting from the inability to perform employment duties, pregnancy is no different from any other health-related reason for absence.

It is not without significance that the Chief Justice gave this construction to the health plan, that is, the more generic scope of health-related reasons, because to do so would forward one of the purposes of anti-discrimination legislation: "This purpose . . . is the removal of unfair disadvantages which have been imposed on individuals or groups in society. Such an unfair disadvantage may result when the costs of an activity from which all of society benefits are placed upon a single group of persons. This is the effect of the Safeway plan. It cannot be disputed that everyone in society benefits from procreation. The Safeway place, however, places one of the major costs of procreation entirely upon one group in society: pregnant women. Thus in distinguishing pregnancy from all other health-related reasons for not working, the plan imposes unfair disadvantages on pregnant women. In the second part of this judgment I state that this disadvantage can be viewed as a disadvantage suffered by women generally. That argument further emphasizes how a refusal to find the Safeway plan discriminatory would undermine one of the purposes of anti-discrimination legislation. It would do so by sanctioning one of the most significant ways in which women have been disadvantaged in our society. It would sanction imposing a disproportionate amount of the costs of pregnancy upon women. Removal of such unfair impositions upon women and other groups in society is a key purpose of anti-discrimination legislation. Finding that the Safeway plan is discriminatory furthers this purpose."

Effect may be a necessary part for a finding in law of discrimination. However, as was made clear in *Brooks* such a finding takes its meaning and thrust from the purposes which the anti-discrimination legislation (i.e. *The Human Rights Code)* is designed to further. As I stated before, one of the primary interests furthered by the *Code* is protection of an individual's dignity.

In *Janzen v. Platy Enterprises Ltd.*, not reported at the time of this Award, the Supreme Court of Canada, in my view, removed any doubt as to protection of dignitary interests. It was faced, in part, with the question under the Manitoba *Human Rights Act* as to whether sexual harassment in the work place was sex discrimination. At issue were the claims of two female servers in a restaurant that they were sexually harassed by the cook who held a position of some authority. The Chief Justice stated:

> "Without seeking to provide an exhaustive definition of the term, I am of the view that sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment. It is as Adjudicator Shime observed in *Bell v. Ladas* (1980), 1 C.H.R.R. D/155 (Ont. Bd.), and as has been widely accepted by other adjudicators and academic commentators, an abuse of power. When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. *Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the work-place attacks the dignity and self-respect of the victim both as an employee and as a human being.*"

V
Ruling

The issues raised by Counsel have been several and complex. They were presented and argued vigorously and with great competence. They deserved and they were given careful consideration. For the reasons stated above, the motions to dismiss are denied.

It is so ordered.

Dated this 23rd day of October, 1989.

Daniel J. Baum, Board of Inquiry